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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER, Plaintiff, v. HARRAH'S ENTERTAINMENT, Inc. and DOES 1 through 100, inclusive, Defendants.	Case No. 07 CV 2226 DMS (AJB) Judge: Hon. Dana M. Sabraw Mag. Judge: Hon. Anthony J. Battaglia **PLAINTIFF JAMES M. KINDER'S POINTS AND AUTHORITIES IN REPLY TO OPPOSITION TO MOTION TO FILE FIRST AMENDED COMPLAINT** Date: January 25, 2008 Time: 1:30 p.m. Place: Courtroom 10

INTRODUCTION

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD: Plaintiff JAMES M. KINDER hereby submits the following Memorandum of Points and Authorities in Support of his Reply to Defendant's Opposition to his Motion to File First Amended Complaint, naming new defendants.

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ARGUMENT

A. DEFENDANT HAS BEEN PUT ON CLEAR NOTICE OF THE NATURE OF PLAINTIFF'S PROPOSED AMENDMENT AND HAS NOT BEEN PREJUDICED.

1. Defendant Does Not Deny The Key Facts Which Give Rise To Liability By The Defendants Plaintiff Seeks To Name.

Defendant blithely asserts that Plaintiff "provides no explanation (factual or legal) for adding these entities to the case…or any viable argument as to why the Court should allow him to amend." (Page 2, Lines 6-8 of Defendant's Opposition.) However, as was conclusively established in Plaintiff's Motion to File First Amended Complaint and the attached Declaration of Chad Austin, it is a matter of public record that HARRAH'S LAUGHLIN, Inc. owns the Harrah's Lauglin Casino. (¶ 5, Declaration of Chad Austin in support of Motion to File First Amended Complaint). Also, see Exhibits A and G, attached hereto and incorporated herein by reference, a Fastweb record and Harrah's website printout showing that Harrah's Laughlin Casino is owned by Harrah's Laughlin, Inc. Defendant does not deny that Harrah's Laughlin, Inc. own Harrah's Laughlin Casino. Moreover, Plaintiff has provided competent evidence that he received a prerecorded telemarketing call promoting Harrah's Laughlin Casino. (¶ 5, Declaration of Chad Austin in support of Motion to File First Amended Complaint). Defendant does not deny that Plaintiff received a prerecorded telemarketing call promoting Harrah's Laughlin Casino. And, as was conclusively established in Plaintiff's Opposition to Defendant's Motion to Dismiss, making unlawful prerecorded telemarketing calls to California residents subjects a Telephone Consumer Protection Act Violator who resides outside California to specific and general jurisdiction in California.

Plaintiff has also provided competent and conclusive evidence that he received a prerecorded telemarketing call promoting Harrah's Las Vegas Casino (¶ 6, Declaration of Chad Austin in support of Motion to File First Amended Complaint) and that Harrah's Operating Company, Inc. owns Harrah's Las Vegas Casino. See Exhibits B, C and H, attached hereto and incorporated herein by reference, a Fastweb record, Nevada Secretary of State's Office website printout and Harrah's website printout showing that Harrah's Las Vegas Casino is owned by Harrah's Operating Company, Inc. Defendant does not deny that Plaintiff received a prerecorded telemarketing call promoting Harrah's Las Vegas Casino or that Harrah's Operating Company, Inc. owns Harrah's Las Vegas Casino.

Plaintiff has also provided competent and conclusive evidence that he received a prerecorded telemarketing call promoting Harrah's Council Bluffs Casino (¶ 7, Declaration of Chad Austin in support of Motion to File First Amended Complaint) and that HBR Realty Company, Inc. owns Harrah's Council Bluffs Casino. See Exhibits D and I, attached hereto and incorporated herein by reference, a Fastweb record and Harrah's website printout showing that Harrah's Council Bluffs Casino is owned by HBR Realty Company, Inc. Defendant does deny that Plaintiff received a prerecorded telemarketing call promoting Harrah's Council Bluffs Casino or that HBR Realty Company, Inc. owns Harrah's Council Bluffs Casino. Because Defendant is well aware of the truth of these facts, it relies on the subterfuge created by Mr. Kostrinsky's misleading and self-serving declaration. Of the highest importance is that Mr. Kostrinsky and Defendant at no point deny any of the factual allegations contained in Plaintiff's Motion to File First Amended Complaint or the attached Declaration of Chad Austin. They choose instead to hide behind diatribes and paper-thin evidentiary objections. Apparently, Defendant believes that it can do away with due process all together and try this matter in its Opposition to Plaintiff's Motion to Amend, knowing full well that Plaintiff has not yet had the benefit of *any discovery*.

2. Defendant Has Cited No Controlling Authority For Its Position That Plaintiff Was Required To Attach A Proposed First Amended Complaint To His Motion In Order To Prevail.

Defendant asserts that the fact that no proposed First Amended Complaint was attached to his Motion to File First Amended Complaint defeats Plaintiff's Motion. However, the authority cited by Defendant does not control this court. Also, in contrast to the Central District of California, there is no local rule in the Southern District which requires that a motion to file an amended complaint be accompanied by the proposed amended complaint. Defendant again seeks to circumvent due process by relying on a non-existent rule, so that Plaintiff will lose his right to name additional parties who are essential to proper determination of this action. Moreover, Plaintiff has attached hereto a Proposed First Amended Complaint *which differs in no way from the original complaint* in this action. The only change to Plaintiff's complaint is that he seeks to name additional parties who are responsible for the unlawful prerecorded telemarketing which is the subject of this action.

Additionally, in that Plaintiff *only seeks to name additional defendants*, not add any causes of action, seek any additional damages or modify his prayer for relief in any way, it is absurd for Defendant to represent to this court that it could possibly be prejudiced in any way by Plaintiff filing an amended complaint. Any prejudice which may *allegedly* flow to *third parties* not yet named cannot logically or properly be claimed by this Defendant. Only those *third parties* could claim any alleged prejudice arising from an amendment naming them as defendants.

3. Defendant Has Been Clearly Noticed Of The Nature Of Plaintiff's Proposed Amendment, Via Plaintiff's Motion And The Declaration Of Chad Austin.

As demonstrated above, Defendant cannot claim ignorance or prejudice therefrom regarding the nature of Plaintiff's proposed amendment. Plaintiff seeks to modify the complaint in one way and one way only: to name additional defendants. Such was clearly set forth throughout Plaintiff's Motion, Memorandum in Support Thereof, and the Declaration of Chad Austin. It is totally disingenuous for Defendant to claim that it has been in any way surprised or kept in the dark, particularly in light of the fact that Plaintiff has herewith submitted a Proposed First Amended Complaint that differs from the original complaint only in that it names additional defendants. Additionally, as stated above, Plaintiff seeks to modify the complaint in no way that would alter or affect his prayer for relief against this Defendant. Defendant cannot in good faith claim any prejudice by Plaintiff's proposed amendment.

4. Plaintiff Has Concurrently Herewith Filed A Proposed First Amended Complaint That Differs In No Substantive Way From The Original Complaint Filed In This Action.

As stated above, the Proposed First Amended Complaint differs in no substantive way from the original complaint. It only names additional defendants, which Plaintiff has an absolute right to do. The Proposed First Amended Complaint alleges the exact same causes of action and contains the exact same prayers for relief. Therefore, Defendant has demonstrated no prejudice whatsoever which could flow to it as a result of Plaintiff naming additional defendants.

5. Defendant Does Not Deny The Allegations Of Ownership Regarding The Casinos Which Were Being Promoted In The Unlawful Prerecorded Telemarketing Calls To Plaintiff.

As detailed above, Defendant does not deny any of Plaintiff's allegations regarding his receipt of unlawful prerecorded telemarketing calls promoting various Harrah's casinos, nor does Defendant deny any of Plaintiff's allegations regarding ownership of those casinos. The simple fact, which Defendant also has not denied, is that Defendant broke the law by making illegal calls to a California resident. It therefore stretches the bounds of reason for Defendant to say that it its illegal conduct has not subjected itself to jurisdiction in California.

Finally, Defendant does not assert in its Opposition or in the Declaration of Michael Kostrinsky that any of the Harrah's entities Plaintiff seeks to amend do not make telemarketing calls to California, even though Plaintiff has alleged that such is true. Nor does Defendant assert that it or any of the other Harrah's entities have not contracted with third-party telemarketing firms to make telemarketing calls to California. Because Plaintiff's entire theory of the case is that jurisdiction is based on Defendant's and the other Harrah's entities' unlawful telemarketing calls to California, as a matter of law, Plaintiff has alleged facts sufficient to hail Defendant and the other Harrah's entities into California to answer for their illegal conduct. **It is particularly noteworthy that Defendant has offered not one single source authority which would stand for the proposition that a nonresident Defendant making unlawful telemarketing calls to California residents is not subject to general or specific jurisdiction in the State of**

California.

B. DEFENDANT ASKS THIS COURT TO DISMISS A COMPLAINT THAT HAS YET TO BE FILED, RELYING ON INCOMPETENT EVIDENCE, ATTEMPTING TO CIRCUMVENT DUE PROCESS.

Defendant's Motion to Dismiss was an end-around, an attempt to try this case at the pleading stage, without giving Plaintiff access to discovery to which he is entitled as a matter of right. Defendant's Opposition to this Motion is a similar and starker example than its Motion to Dismiss of Defendant attempting to deny Plaintiff his due process rights. Rather than address the merits of Plaintiff's request for leave to amend, Defendant has chosen to contort its Opposition thereto into an impromptu Motion to Dismiss. This is truly putting the cart before the horse. If Defendant chooses to challenge the First Amended Complaint after it has been filed, it certainly has the right to do that. What Defendant does not have the right to do, and what Defendant is attempting to do, is dismiss an amended complaint that has not yet even been filed. This approach offends notions of fair play and justice and should not be entertained by the court.

C. PLAINTIFF WILL SUFFER IRREPERABLE INJURY IF THIS COURT DOES NOT GRANT HIS MOTION TO AMEND, NAMING NEW DEFENDANTS.

As was stated in Plaintiff's Memorandum of Points and Authorities in Support of Motion to File First Amended Complaint, the 120 days after commencement of this action by which Plaintiff must have served all "Doe" defendants, pursuant to FRCP 4 (m) [if applied by the Court], is January 30, 2008. If the relief sought herein is not granted, Plaintiff may forever lose the right to amend his complaint to add defendants who are parties absolutely necessary to the full and final adjudication of Plaintiff's claims. Therefore, considering that Defendant has demonstrated no potential prejudice to it, any balancing of equities affecting the determination of this Motion tips only in one possible direction: in favor of Plaintiff.

D. IN ADDITION TO EACH TO-BE-NAMED HARRAH'S ENTITY HAVING CASE-RELATED CONTACTS, HARRAH'S MARKETING SERVICES CORPORATION AND HARRAH'S OPERATING COMPANY, INC. HAVE CONSENTED TO SUIT IN CALIFORNIA

Plaintiff seeks to name, *inter alia*, Harrah's Marketing Services Corporation and Harrah's Operating Company, Inc. as defendants in this matter. Both of those entities have designated agents for service of process on file with the California Secretary of State (*See*, Exhibits E and F, respectively). They have *consented to suit* in the State of California and are therefore subject to general and specific jurisdiction here. "Appointment of a registered agent for service…is a traditionally recognized and well accepted species of general consent." Knowlton v. Allied Van Lines, Inc. (8th Cir. 1990) 900 F2d 1196, 1199 – federal statute required interstate carrier to designate local agent; Bane v. Netlink, Inc. (3rd Cir. 1991) 925 F2d 637, 640-641 – foreign corporations authorized to do business in state statutorily designate Secretary of Commonwealth to accept process.

E. A SUBSTANTIAL NUMBER OF AUTHORITIES FROM AROUND THE UNITED STATES, INCLUDING THE CALIFORNIA SUPREME COURT, STAND FOR THE PROPOSITION THAT A HOTEL'S OUT OF STATE ADVERTISEMENTS SUBJECT IT TO SPECIFIC JURISDICTION IN THE STATE IN WHICH IT ADVERTISES, *EVEN IF THE INJURY IS SUFFERED IN THE STATE WHERE THE HOTEL AND FOREIGN CORPORATION RESIDE.*

In Snowney v. Harrah's Entertainment, Inc. 35 Cal.4th 1054, 112 P.3d 28, 29 Cal.Rptr.3d 33 (June 6, 2005), a California resident filed a class action suit in Los Angeles Superior Court against various Nevada hotels, including Harrah's Entertainment, Inc. [Defendant herein], alleging causes of action for California's unfair competition law, breach of contract, unjust enrichment and false advertising. The Plaintiff, Mr. Snowney, alleged that the hotels had failed

failed to provide notice of an energy surcharge imposed on hotel guests. The Los Angeles Superior Court granted a motion to quash service of summons for lack of personal jurisdiction. The Court of Appeal reversed, which holding was affirmed by the California Supreme Court.

The California Supreme Court noted,

> "By purposefully and successfully soliciting the business of California residents, defendants could reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident. (See *Burger King*, *supra*, 471 U.S. at pp. 475-476.)
>
> Cases holding that claims for injuries suffered during a plaintiff's stay at a hotel or resort are not related to and do not arise from that hotel's or resort's advertising in the forum state are inapposite.[Citations in footnote omitted]. As an initial matter, most, if not all, of these cases did not apply the substantial connection test established in *Vons*. In any event, even if we agree with the holdings in these cases, [Citations in footnote omitted] they are distinguishable. Unlike the injuries suffered by the plaintiffs in those cases, the injury allegedly suffered by plaintiff in this case relates *directly* to the content of defendants' advertising in California. As such, the connection between plaintiff's claims and defendants' contacts is far closer than the connection between the claims and contacts alleged in the cases cited above. Indeed, some courts that have refused to exercise jurisdiction where a plaintiff suffered an injury during a stay at a hotel or resort acknowledge that they would have reached a different conclusion if that plaintiff had alleged false advertising or fraud. (See *Smith*, *supra*, 1997 WL 162156 at p. *6 [suggesting that claims of false advertising or fraudulent misrepresentation would meet the relatedness requirement]; *Oberlies*, *supra*, 633 N.W.2d at p. 417 ["A foreign corporation that advertises in Michigan can reasonably expect to be called to defend suits in Michigan charging unlawful advertising or alleging that the advertising, itself, directly injured a Michigan resident"].) Accordingly, we conclude that plaintiff has met the relatedness requirement." *Id at* 37-38.

The Court also noted in a footnote that "Several courts have reached the…conclusion— that injuries suffered during a stay at a hotel or resort *are* related to and *do* arise from that hotel's or resort's advertising in the forum state. (See, e.g., *Nowak v. Tak How Investments, Ltd.* (1st

Cir. 1996) 94 F.3d 708, 715-716; *Mallon v. Walt Disney World Co.* (D.Conn. 1998) 42 F.Supp.2d 143, 147; *O'Brien v. Okemo Mountain, Inc.* (D.Conn. 1998) 17 F.Supp.2d 98, 101; *Rooney v. Walt Disney World Co.* (D.Mass. 2003) 2003 WL 22937728, p. *4; *Sigros v. Walt Disney World Co.* (D.Mass. 2001) 129 F.Supp.2d 56, 67; *Shoppers Food Warehouse, supra*, 746 A.2d at p. 336; *Tatro v. Manor Care, Inc.* (Mass. 1994) 625 N.E.2d 549, 553-554; *Radigan v. Innisbrook Resort & Golf Club* (N.J.Sup.Ct.App.Div. 1977) 375 A.2d 1229, 1231.)" Id.

It is therefore well settled in the State of California that a foreign corporation hotel advertising to California residents subjects itself to specific jurisdiction in the State of California, particularly if the advertising is unlawful. Because Plaintiff's claims relate to an illegal advertising method, unlawful prerecorded telemarketing, directed at California residents, Defendant and the other Harrah's entities are absolutely subject to specific jurisdiction in the State of California.

CONCLUSION

For all of the reasons stated above, Plaintiff respectfully requests that this Court grant Plaintiff's Motion to File First Amended Complaint, naming new defendants over whom this court has jurisdiction.

DATED: January 17, 2008

By: /s/ Chad Austin
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